

Introduction

This document constitutes comments by the Historic Preservation Division, Georgia Department of Natural Resources, on the proposed “Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission,” Docket No. 03-128.

The Historic Preservation Division, Georgia Department of Natural Resources, is Georgia’s state historic preservation office. Our office represents the state’s public interest in historic preservation. We also consult with federal agencies and their applicants regarding undertakings that might affect historic properties under the provisions of the National Historic Preservation Act and the implementing regulations of the Advisory Council on Historic Preservation.

Our office was not an official member of the “working group” which drafted the proposed programmatic agreement. However, on the basis of our experience reviewing hundreds of proposed communications facilities in Georgia, we have conscientiously commented on every draft and every issue made available to us through the National Conference of State Historic Preservation Officers. Many of our concerns have been addressed as the proposed agreement was revised. However, our office still has major objections to certain provisions (or lack of provisions) of the final draft which we believe will significantly compromise our opportunities and the Federal Communication Commission’s ability to insure that historic properties are effectively taken into account in reviewing proposed communications facilities. It is these objections that we present here.

Qualified Historic Preservation Professionals

Our major objection to the proposed programmatic agreement is the lack of a clear and absolute requirement that FCC applicants retain the services of qualified historic preservation professionals in carrying out their delegated Section 106 responsibilities (see the final “whereas” clause on page A-3). In our experience, the lack of historic preservation expertise on the part of FCC applicants has been the single biggest stumbling block to efficient and effective Section 106 review of proposed communications facilities, and it is the greatest factor causing complications, confusion, and delays throughout the process. And yet it is the most easily remedied, by a simple provision in the programmatic agreement requiring the involvement of qualified historic preservation professionals. Since the purpose of the programmatic agreement is to develop special procedures for complying with Section 106, it would seem that this provision could easily be included. If an FCC applicant is unwilling or unable to retain qualified historic preservation professionals, then it could proceed through the regular Section 106 compliance process, following the Advisory Council on Historic Preservation’s implementing regulations 36 CFR 800, absent the special provisions of this programmatic agreement.

The absence of qualified historic preservation professionals in the Section 106 process for communications facilities has resulted in the following four fundamental problems:

Poor methodology used by applicants resulting in unreliable results and findings;

Irregular and unreliable compilation of basic data from file searches and field surveys;

Faulty analysis of data and erroneous findings of eligibility and effects clearly inconsistent with National Register of Historic Places and Advisory Council on Historic Preservation criteria and guidance;

Disorganized and poor quality presentations of documentation including survey reports, effects assessments, and Memoranda of Agreement.

We would note that although the proposed programmatic agreement regularizes many aspects of the Section 106 process for communications facilities, it may do a disservice to applicants, agencies, and historic preservation interests by making it appear as though the compliance process is simply a matter of following steps and checking off boxes rather than thoughtful consideration of historic properties requiring the involvement of professional expertise.

To emphasize the importance of this professional requirement, we would note that even at this late date, after nearly a decade of reviewing of wireless communications facilities, our office still receives, on a regular basis, Section 106 reports from FCC applicants who have employed no historic preservation expertise and who have relied upon non-preservation professionals such as biologists, geologists, ecologists, communications engineers, marketing staff, and real estate specialists—none of whom has any background, training, or experience in historic preservation. We also regularly receive Section 106 reports from FCC applicants who ostensibly have historic preservation expertise available but the qualified professionals have not been materially involved in all aspects of the compliance process including collection of data, analysis, and presentation of findings. And indeed, we still see the occasional application where findings have been clearly distorted or omitted as revealed through subsequent consultation. In our opinion, this industry's track record in historic preservation compliance does not foster confidence nor does it support further delegation of responsibility and assignment of discretion under the kind of special treatment provided through the proposed programmatic agreement without a clear and absolute requirement for the involvement of qualified historic preservation professionals at every step in the Section 106 process as outlined by the programmatic agreement.

State-by-State Adoption or Modification

We disagree with the Working Group's assertion that a nationwide programmatic agreement is a desirable and effective way to further streamline and tailor the Section 106 process for communications facilities (fifth "whereas" clause, page A-2). We believe that state-by-state adoption or modification is the only way to accommodate pronounced variations from state to state regarding historical development patterns, understanding of and appreciation for historic properties, environmental and geographical conditions, preservation awareness, and state and

local land-use legislation and regulation which play critical roles in the way in which communications towers are sited, designed, constructed, reviewed, and perceived.

Exclusions

We strongly object to the exclusions in Section III. A. 4. and 5.

As we understand the exclusion in Section III. A. 4., this would exclude from review any towers built on lots as small as 100 feet by 100 feet (10,000 square feet, or less than one-quarter acre) used for industrial, commercial, or governmental purposes where there are no potentially historic properties within just 200 feet. This appears to be a gigantic loophole which would allow for enormous unreviewed towers not only adjacent to listed or eligible historic properties but also actually within some historic districts--and where it is highly likely, indeed almost a certainty, that such towers would have adverse effects on the historic properties in close proximity: for example, under this exclusion, a 400-foot tower could be built within 201 feet of a historic property or historic district and be exempt from review, or it could be built on a large industrial, commercial, or governmental lot within a historic district. We find this exemption unacceptable, and we recommend that the standard guidelines for determining areas of potential effect specified in Section VI. B. 2. should apply in all situations where proposed communications facilities may affect nearby historic properties.

The Interstate-highway exclusion in Section III. A. 5. b. continues to be unacceptable. It would result in an "effects-free" corridor along most Interstate highways. This would mean that Section 106 review would not apply to many listed as well as eligible rural historic properties including rural districts, small crossroads communities, and urban neighborhoods (many of which in Georgia would be African-American) simply through the misfortune of their being in close proximity—but just not within 200 feet--of an Interstate highway. It would also exempt from further consideration historic landscapes associated with eligible historic buildings if the buildings happen to be more than 200 feet away even if the associated historic landscapes abut the proposed communications facility site. Such an exclusion makes sense only in situations where the Interstate highways run through corridors marked by extensive modern development; this should be clearly spelled out.

We would point out that in Georgia this exclusion would open the door for unreviewed communications towers immediately adjacent to the Resaca Civil War Battlefield--a rural site, with no historic buildings or structures, bisected by Interstate 75--which is being developed as a state historic site. This is clearly an undesirable situation from any point of view.

Of particular concern is the fact that not even National Register-listed historic properties in or adjacent to these corridors would receive consideration if they have the misfortune of being located just beyond the 200-foot exemption zone. Above and beyond possible adverse effects, this would likely be perceived as a "breach of contract" by property owners and local preservationists who have been assured for years that National Register listing insures Section

106 consideration. This would undermine the credibility of not only the Section 106 process but also the National Register program and the state historic preservation offices.

As an alternative, we strongly support the “opt out” provision proposed by the NCSHPO where states believe there is a high probability of historic properties being present in this kind of highway corridor (footnote 5, page A-9).

Similarly, the railway corridor exclusion in Section III. A. 5. c. continues to be unacceptable. It would result in an “effects-free” corridor along passenger-service railroads. Georgia currently has approximately 250 miles of passenger-service railroads with plans to double that number within the next few years. These railroads go through or adjacent to historic farms and plantations, rural historic districts, small historic crossroads and railroad communities, county seats, urban neighborhoods, and historic commercial and industrial corridors. Under the proposed exclusion, these historic properties would receive no consideration through the Section 106 process for communications towers if, by some happenstance of development, there are no historic structures within just 200 feet of the railroad.

We would note that many railroad-related communities in Georgia are located on high points of ground where trains could stop more easily (going upgrade) for fuel, water, and loading/unloading passengers and freight and then start up more easily (going downgrade). Ironically, this high-ground situation will make these same railroad-related historic communities “targets” for communications towers which, under the provisions of the proposed agreement, would be exempt from Section 106 review should the tower site be located just 201 feet away.

Again, as with the Interstate-highway exclusion, of particular concern is the fact that not even National Register-listed historic properties in these corridors would receive consideration if they are situated beyond the 200-foot exemption zone. Again, this would likely be perceived as a “breach of contract” by property owners and local preservationists who have been assured for years that National Register listing insures Section 106 consideration. This would undermine the credibility of not only the Section 106 process but also the National Register program and the state historic preservation offices.

As an alternative, we strongly support the “opt out” provision proposed by the NCSHPO where states believe there is a high probability of historic properties being present in this kind of railroad corridor (footnote 5, page A-9).

Visual Effects

With regard to the visual effects provisions in Section VI. E. 3., we continue to be concerned over methods for determining adverse visual effects which are not consistent with the criteria and guidelines used for determining National Register eligibility and boundaries and for determining whether or how much the setting and surroundings of an eligible or listed historic property contribute to the significance of the property and its sense of time, place, and development.

While these factors may be paramount in the four types of historic properties listed in this section, they are present to some degree in virtually every historic property; consideration of adverse effects should be provided to every eligible or listed historic property where setting, surroundings, and visual qualities contribute to the significance of the property. Our concern would be lessened if we are correct in our understanding that the four “examples” presented in this section are indeed examples and not meant to be all-inclusive or exclusionary of other situations in which visual qualities are important to the significance and eligibility of historic properties.

We do object, however, to the alternative language proposed by PCIA in footnote 13, page A-20, which would restrict visual effects to communications facilities built within, but not adjacent to or in proximity to, the boundaries of eligible or listed historic properties. This is contrary to guidance on National Register eligibility, setting, surroundings, and boundaries in National Register Bulletin *How to Apply the National Register Criteria for Evaluation*, page 45, and contrary to guidance in regulations of the Advisory Council on Historic Preservation (36 CFR 800.5). When the larger surroundings of a historic property contribute to the overall character and sense of time and place of the property, then they should be taken into account in determining visual effects.

Review Periods and Time Frames

With regard to Section VII. A. 3., we note our appreciation for simplifying the state historic preservation office review time frames and making them consistent with the 30-day standard for Section 106 review. However, we object to the requirement that late submissions of additional information by applicants (within the last five days of the 30-day review period) only extend the state office’s review period by five days. Depending on the nature of the additional information submitted, substantial review and consultation may be required to properly consider the new material. This is especially true if the original submission was severely deficient and the follow-up materials are substantial, essentially constituting a new submission. In these situations, it is unreasonable to expect the state office to conduct a thorough review in such a short period of time. Any shortened time frames should be keyed to the nature and extent of the newly submitted materials and the expected amount of effort required for their review.

Conditional No Adverse Effects

With regard to the provisions of Section VII. C. 5.-6., we continue to believe that the notion of “conditional no adverse effects” is an effective way of expediting certain Section 106 reviews. We support such a procedure if it results in actual changes in the physical program for the subject communications facility which avoid adverse effects. However, we are concerned about the possibility that this provision may be misused by applicants who may propose mitigation measures rather than measures that actually avoid adverse effects. We would not support such a procedure if it is used as an “end-run” around adverse effects; in those cases, we believe an adverse effect determination is most appropriate followed by mitigation measures.

We strongly support the Advisory Council's recommendation in footnote 16 on page A-22 that applicants "will" consult with state historic preservation offices in an attempt to come up with ways of avoiding adverse effects prior to moving on to mitigation measures. We believe that every reasonable effort should be made to avoid adverse effects before considering mitigation measures.

New Tower Transmission Form

Finally, we note that item number 5 on the "cover sheet" for the "new tower submission form" (Attachment 3, page 3-3) has a checklist option for "construction commenced but not completed." This could easily be misconstrued by applicants who may look at only the form and not the instructions and come away with the impression that it's acceptable to submit their Section 106 documentation after construction has begun. This checklist item should be strongly conditioned to indicate that it only pertains to out-of-compliance situations where construction was begun before Section 106 compliance was initiated. We also believe that in these situations the applicant should be directed to inform the Federal Communications Commission concurrent with or instead of the state historic preservation officer, since the project is by admission already out of compliance and possibly beyond the ability of the state historic preservation office to make meaning comment.

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